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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Robert A. Pastor; Scott M. Van Horn; Regina M. Florence; and William E. Florence III; on behalf of himself and all others similarly situated, Plaintiff, v. **Bank of America, N.A.,** Defendant.	Case No.: 3:15-cv-03831-VC **CLASS ACTION** **Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement** Hearing: Date: August 16, 2018 Time: 10:00 am Dept.: Courtroom 4 (17th Floor) Judge: Hon. Vince Chhabria

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Plaintiffs Robert A. Pastor, Regina Florence, William Florence, and Scott Van Horn (collectively referred to as "Plaintiffs") on behalf of themselves and others similarly situated, request final approval of this proposed class action settlement agreement (the "Revised Settlement Agreement," "Agreement," or "Agr.") with Defendant Bank of America, N.A. (referred to as "Defendant" and/or "BANA"). Defendant BANA does not oppose this motion.

I. INTRODUCTION

This Settlement was overwhelmingly supported by the class as 19.52% of Class Members opted-in and no objections were filed. This settlement is the culmination of three years of litigation and provides relief for all the Class Members allegedly harmed by BANA's credit reviewing process. The Revised Settlement Agreement and Addendum, reached after mediation sessions before Honorable Edward A. Infante (Ret.), provide for a considerable financial benefit of $1,802,998.58[1] in a common fund ("Settlement Fund") to the total settlement Class Members. [2]

Under the Revised Settlement Agreement ("Agreement" or "Agr."), each Class Member who timely submits an approved claim will receive a *pro rata* award from the Settlement Fund. Agr. at ¶ 69.[3] As of July 19, 2018, Kurtzman Carson Consultants, LLC ("KCC" or "Claims Administrator") has processed 121,956 claim forms and determined 114,512 to be valid. Declaration of Deborah McComb

[1] Original settlement fund of $1,645,000 plus the additional amount of $45,646.58 paid to Group 2 Class Members, $20,000 for attorney's fees and an additional $92,352.00 for the supplemental notice.

[2] Defined terms are used as defined in the Revised Settlement Agreement.

[3] The Revised Settlement Agreement was filed at Dkt. No. 54-1. In addition, the parties executed an Addendum to the Settlement Agreement that supplemented the Revised Settlement Agreement. The Addendum was filed at Dkt. No. 69-1. This memorandum refers to the Addendum as appropriate.

("McComb Decl."), ¶ 19.

Every Class Member had the opportunity to receive a *pro rata* share of the Settlement Fund by: (1) submitting an online claim via the Settlement Website, or (2) by submitting a Claim Form by mail to the Claims Administrator, or (3) submitting a claim over the phone through Interactive Voice Response ("IVR"). Agr. ¶ 43. The Class Members were informed of the Settlement by direct Mail Notice, Publication Notice, and the detailed notice posted on the Settlement Website. *Id*.

Currently, after subtracting the requested attorneys' fees and costs, service award to the Class Representatives, and the notice and administrative expenses from the Settlement Fund, each of the 114,512 valid claims received thus far will be entitled to a settlement check of approximately $4.06. The deadline to submit a claim to the Settlement was June 19, 2018. McComb Decl., ¶ 19.

This Settlement also created an incentive for Defendant and other businesses to comply with the FCRA, which benefits the Class Members, consumers in general, and compliant competitive businesses. *See* David R. Hodas, *Enforcement of Environmental Law in A Triangular Federal System: Can Three Not Be A Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552, 1657 (1995) ("[A]llowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance.").

The reaction to this settlement was extremely positive and should be given final approval, especially in the absence of any objections to the Settlement.

II. PROCEDURAL HISTORY

Plaintiff Pastor filed the initial class action complaint on August 21, 2015 asserting violations of the Fair Credit Reporting Act 15 U.S.C. § 1681n [See Dkt. No. 1]. Thereafter, BANA responded by generally denying the allegations of

Plaintiff's Complaint. [Dkt. No. 18]. A mediation occurred before Honorable Edward A. Infante (Ret.) was held on July 26, 2016. A Settlement Agreement and Release was fully executed by the parties on April 13, 2017.

On April 13, 2017, the parties jointly filed a Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class ("Preliminary Approval Motion") [Dkt No. 46],[4] which the Court granted on July 7, 2017 (*see* Order granting Motion for Preliminary Approval of Class action Settlement and Certification of Settlement Class ("Preliminary Approval Order") [Dkt. No. 55]).

A Revised Settlement Agreement and Release that superseded the original Agreement was fully executed by the parties on June 22, 2017.

On October 12, 2017, Plaintiffs timely filed a Motion for Attorneys' Fees, Costs and Incentive Payment (the "Fee Brief"), Dkt. No. 58, which was thirty days prior to the deadline to object to the Settlement.

After BANA complied with the Preliminary Approval Order and provided notice of the Settlement to approximately 526,627 Group 1 Original Settlement Class Members, in December 2017, BANA discovered that, due to an inadvertent error in retrieving names and addresses of class members from BANA's electronic consumer records, the Class Settlement Notice was not mailed to all borrowers on accounts with multiple borrowers. Due to a retrieval error, only the primary borrower listed on the account was included in the mailing list of Settlement Class Members created by BANA. As a result, additional or secondary borrowers' names were not included in the mailing list and therefore were not separately named on the Class Settlement Notice KCC mailed to their properties. BANA identified

[4] Supplemental briefing was filed on June 07, 2017 (Dkt. No. 52) and on June 23, 2017 (Dkt. No. 54).

approximately 61,410 secondary or additional borrowers (the "Affected Settlement Class Members") in Group 2.[5]

Accordingly, on February 2, 2018, the parties filed a Joint Motion to Request Supplemental Preliminary Approval of Addendum to Revised Class Action Settlement Agreement (the "Supplemental Preliminary Approval Motion"). Dkt. No. 68. The motion sought the Court's approval of the Supplemental Class Settlement Notice.

The parties executed the Addendum on February 12, 2018. Under the Addendum, the parties agreed to provide a settlement amount of $1,645,000 in a common fund ("Settlement Fund") to the 526,627 Original Settlement Class Members in Group 1 and an additional amount (that was undetermined at the time of the settlement) to the 60,174 Affected Settlement Class Members in Group 2 so that any approved claims from Group 2 would each receive the exact same amount as each class member from Group 1.

In its February 26, 2018 order, the Court ordered the parties to revise the Supplemental Class Settlement Notice to include additional information, as well as clarify certain information to be in line with the Addendum to the Class Action Settlement Agreement. Dkt. No. 71. The parties revised the Supplemental Class Settlement Notice to comply with the February 26, 2018 order.

On March 16, 2018 the Court granted the Supplemental Preliminary Approval Motion. Dkt. No. 79.

A total of 586,801 Class Members (526,627 from Group 1 and 60,174 from Group 2) were provided notice. 568,531 class members received notice. McComb

[5] The number of Affected Settlement Class Members included in this paragraph was an estimate at the time. The final number was reduced to 58,090 after accounting for duplicates.

Decl., ¶ 13. To date the Claims Administrator has received a total of 121,956 claims. McComb Decl., ¶ 19. Of these claims, 103,269 were determined to be valid claims from Group 1 and another 11,243 from Group 2 for a total of 114,512 valid claims (from Groups 1 and 2). *Id.*

Class Members were permitted to request exclusion from the Settlement. Agr. ¶ 50; Addendum ¶ 11. Thirty-three requests for exclusion have been received by the Claims Administrator as of July 19, 2018. McComb Decl., ¶ 17. Class Members were also permitted to object to the Settlement. Agr. ¶ 51; Addendum ¶ 12. There are no objections to the Settlement. McComb Decl., ¶ 18.

Plaintiffs now submit this timely motion for final approval of class action settlement. Pursuant to Rule 23(e), Plaintiffs seek final certification and approval of the proposed class action settlement, as well as approval of the Fee Brief. Specifically, Plaintiffs respectfully request that the Court enter a Final Judgment and Order of Dismissal with Prejudice similar to the proposed order submitted with this unopposed motion.

III. THE FCRA AND THE CLASS ALLEGATIONS

The Fair Credit Reporting Act ("FCRA") permits creditors to access or "pull" credit information from files maintained by credit reporting agencies only for certain specified "permissible purposes." *See 15 U.S.C. §1681b.* One permissible purpose is to conduct a soft credit inquiry referred to as an "account review" (i.e., a creditor may seek information from a given consumer's credit report when it "has a legitimate business need for the information to review an account to determine whether the consumer continues to meet the terms of the account" or it "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the…review…of an account of the consumer". *See 15 U.S.C. §1681b(a)(3)(A) & (F)(ii).*

These account reviews are initiated by the creditor and are considered "soft credit pulls" because the creditor pulls information from the consumer's report, but the pull is not visible to any party other than the consumer, and does not affect the consumer's credit score. Further, consumers only learn of the soft pull by reviewing their credit reports; they are not routinely notified that a soft pull has actually occurred.

Plaintiffs asserted that they are former customers of BANA, who included BANA as a creditor in each Plaintiffs' bankruptcy in the U.S. Bankruptcy Court, District of Nevada. [Plaintiff's First Amended Complaint ("FAC"), ¶¶ 23-24, 40-41, & 52-53. Each Plaintiff learned by reviewing their credit report that BANA had still conducted soft pulls of their credit file after the bankruptcy discharge date for the alleged purpose of conducting account reviews. FAC ¶¶ 29, 46 & 59. Plaintiffs alleged that they did not conduct any business nor incur any additional financial obligations with BANA since the date of the discharge of their bankruptcies. FAC ¶¶ 31& 58.

On or about August 21, 2015, Plaintiff Pastor filed his complaint against BANA. On April 11, 2017, the parties filed a stipulation requesting the Court allow Plaintiff to file a First Amended Complaint adding Regina Florence, William Florence, and Scott Van Horn as additional plaintiffs and class representatives[6]. In the First Amended Complaint, Plaintiffs alleged that BANA did not have a permissible purpose to pull their credit file information from their credit reports because they did not give their consent and their debt had been discharged in Bankruptcy on the dates that BANA accessed their credit files. FAC ¶¶ 31, 46 &

[6] Regina and William Florence, and Scott Van Horn each had previously filed a class action in the U.S. District Court District of Nevada, case numbers 2:16-cv-00365 and 2:16-cv-00362-JCM-VCF respectively, but the definition of this class encompasses the putative classes in their previously filed cases. Therefore in the interest of judicial economy the Nevada cases were dismissed and the respective plaintiffs were added to this matter.

59. Plaintiffs alleged that BANA's conduct was willful because not only should BANA have received notice of Plaintiffs' bankruptcy filing and discharge, but in some cases, Plaintiffs alleged that BANA also received additional notices throughout the bankruptcy. As to Plaintiff Pastor, Plaintiff Pastor alleged that BANA received a notice of a motion and an order respectively titled NOTICE OF MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS OF BANK OF AMERICA (ACCT ENDING IN 7199) PURSUANT TO 11 U.S.C §506(a) AND §1322," and "ORDER ON MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS OF BANK OF AMERICA (ACCT ENDING IN 7199) PURSUANT TO 11 U.S.C §506(a) AND §1322 BY DEBTORS." FAC ¶ 26.

For willful violations of the FCRA, successful plaintiffs are entitled to recover statutory damages of $100-$1,000, attorneys' fees, and potentially, punitive damages. *See 15 U.S.C. §1681n.* In their suit, Plaintiffs sought such damages for themselves and for the members of the class they seek to represent. For merely negligent violation of the FCRA's permissible purpose provisions, consumers are restricted to recovery of their actual damages. *See 15 U.S.C. §1681n.* It is difficult to prove actual damages in any account review case because "soft pulls" are seen only by the consumer and do not affect consumers' credit scores.

Defendant answered and denied all of the allegations and liability. *See* Dkt. No. 18; *see also* Recitals to Agreement.

IV. SETTLEMENT

BANA realized the risks in continuing litigation and the potential for Plaintiff prevailing under a class action. Plaintiff, in turn, also realized the risks of moving forward with litigation and having BANA prevail. Thus, the parties agreed to participate in mediation. The Honorable Edward A. Infante (Ret.) was chosen as mediator by the parties due to his extensive experience in the settlement of large

class action cases, in particular those involving claims for statutory damages under the FCRA and other consumer protection statutes. The mediation occurred on July 26, 2016 and an agreement was reached outlining a settlement. After additional confirmatory discovery was conducted, a Settlement Agreement and Release was fully executed by the parties on April 13, 2017. A Revised Settlement Agreement and Release that superseded the original Agreement was fully executed by the parties on June 22, 2017. The Addendum to the Revised Settlement was executed by the parties on February 12, 2018.

As noted in the Preliminary Approval Motion (Dkt. No.46), the Settlement Agreement resulted from extensive arm's length negotiations before the Honorable Edward A. Infante (Ret.). The parties also conducted substantial discovery, including written discovery, and a confirmatory deposition following mediation. Kazerounian Decl., ¶ 6. The parties also engaged in further negotiations to prepare and finalize the Revised Settlement Agreement and the Addendum.

The time and effort spent on settlement negotiations, as well as the time spent with Judge Edward A. Infante (Ret.) in the mediation session, militate in favor of final approval of the proposed Settlement, as they strongly indicate there was no collusion.

A. The Fairness Hearing

At the Fairness Hearing, the Court will decide whether to finally approve the Settlement and will also consider the Fee Brief requesting $431,250 in attorneys' fees and actual litigation costs (currently $19,023.42), and a service award of $5,000 to each of the four Class Representatives.

B. Attorneys' Fees, Costs Application, And Service Awards

As explained in the Fee Brief, pursuant to the terms of the Revised Settlement Agreement and the Addendum, Class Counsel shall move the Court for

an award of attorneys' fees ("Motion for Fees") and costs not to exceed 30% of the amount actually contributed to the common fund. [Settlement Agreement, ¶ 53]. Any award of fees and costs approved by the Court shall be paid from the common fund three days after the Effective Date. Court approval of Class Counsel's attorney's fees and costs is not a condition of the settlement. [*Id.*]. Class Counsel now seeks $431,250 in attorneys' fees, which represents less than 25% of the total Settlement Fund of $1,802,998.58; costs of litigation in the amount of $19,023.42; and service awards in the amount of $5,000 to each of the Class Representatives to be distributed from the Settlement Fund.

Plaintiffs respectfully request that the Court enter an Order similar to the Final Judgment and Order of Dismissal with Prejudice submitted with this motion, which includes a provision for such requested attorneys' fees, costs, incentive payments, and payment for notice and claims administration.

C. Class Action Settlement Terms

The significant terms of the Settlement are as follows:

1. Certification of a Fed. R. Civ. P. 23(b)(3) Settlement Class

The Settlement Class is defined as:

> All persons with an address within the United States whose consumer credit report was obtained by BANA and/or FIA Card Services (FIA) for an Account Review Inquiry during the period August 21, 2010, through the Date of Preliminary Approval where the subject account relationship had terminated because any of the following criteria were met: (i) the debt on the account had been discharged in bankruptcy; (ii) the account was closed with a zero balance; or (iii) the account had been sold or transferred to a third party. Excluded from the Class are all current Bank of America employees, officers and directors, and the judge and magistrate presiding over this Action and their respective staff.

2. The Settlement Fund

The Settlement established a fund of $1,645,000 paid by BANA to resolve the claims at issue. *See* Agr. ¶ 32. In addition, under the Addendum, BANA agreed to pay each of the Affected Settlement Class Members who made a valid claim the amount that each of the Original Settlement Class Members would have received under the original settlement. *See* Addendum ¶ 9. There are currently 11,243 valid claims from Group 2, and with each claimant receiving the $4.06 as is to be received by Group 1 class members, BANA is to pay an additional $45,646.58. Payments from the Settlement Fund are in the form of a *pro rata* settlement check, which will be mailed to each of the Class Members who made a valid and approved claim. Agr. ¶ 69. KCC will send the Settlement Checks via U.S. mail no later than thirty (30) days after the Judgment has become final ("Effective Date"), as provided under the Agreement. *Id.* Any funds not paid out as the result of un-cashed Settlement checks will be paid out as a *cy pres* award, to a recipient to be agreed to by the parties and approved by the Court, as set forth in ¶ 75 of the Agreement. No money remaining in the Settlement Fund shall revert to or otherwise be paid to BANA.

V. ACTIVITY IN THE CASE AFTER PRELIMINARY APPROVAL

The unusually high participation rate, the low number of opt-outs, and the absence of objections indicate that the terms of the Settlement as conveyed by the three methods of notice, were understood by the class. *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 572 (D.N.J. 2010), *rev'd on other grounds sub nom. Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012). The Claims Administrator's compliance is described below.

A. CAFA Notice

The initial CAFA notice was mailed on May 19, 2017, and supplemental CAFA notices were mailed on July 28, 2017, September 6, 2017, and September 14, 2017. *See* McComb Decl., ¶¶ 1-8 and supporting exhibits attached to McComb declaration.

B. Mail Notice

KCC complied with the notice procedure set forth in the Preliminary Approval Order (Dkt. No. 55). On July 27, 2017, KCC received from Defendant a lists of 534,972 persons identified as the Class List and on and August 8, 2017, an additional Class List containing 618 persons. McComb Decl., ¶ 9. The Class Lists included names and mailing addresses. *Id.* KCC formatted the lists for mailing purposes and processed the names and addresses through the National Change of Address Database ("NCOA") to update any addresses on file with the United States Postal Service ("USPS"). *Id.* A total of 50,789 addresses were found and updated via NCOA. *Id.* KCC removed duplicates and updated its proprietary database with the Class List, including those records with incomplete mailing addresses. *Id*.

On August 16, 2017, KCC caused the double post-card notice with detachable claim form "Mail Notice" to be printed and mailed to the 526,627 names and mailing addresses in the Group 1 Class List. McComb Decl., ¶ 11.

On March 23, 2018, KCC sent the Supplemental Mail Notice to all 58,090 class members from Group 2 for whom BANA had identifiable or known addresses. After performing additional research to locate the remaining addresses, KCC sent out notice to an additional 2,084 Group 2 class members on April 10, 2018. *Id*.

Since mailing the Mail Notices to the Class Members, KCC has received 6,976 Mail Notices returned by the USPS with forwarding addresses (6,553 from Group 1 and 423 from Group 2). McComb Decl., ¶ 12. KCC immediately caused

Mail Notices to be re-mailed to the forwarding addresses supplied by the USPS. *Id*. Since mailing the Mail Notices to the Class Members, KCC has received 63,717 Mail Notices returned by the USPS with undeliverable addresses (56,478 from Group 1 and 7,239 from Group 2). McComb Decl., ¶ 13. Through credit bureau and/or other public source databases, KCC performed address searches for these undeliverable Mail Notices and was able to find updated addresses for 45,447 Class Members (39,885 from Group 1 and 5,562 from Group 2). *Id*. KCC promptly re-mailed Mail Notices to the new found addresses. *Id.*

C. Publication Notice

To provide notice to the Class Members for whom there are no names and addresses, KCC gave notice of the Settlement by national publication in USA Today on August 16, 2017. McComb Decl., ¶ 14 (Exhibit k thereto). This notice summarized the Settlement, advised the Class Members on how to file claims and directed Class Members to the settlement website for further information about the Settlement.

D. Detailed Notice Posted On The Settlement Website

On August 15, 2017, KCC established a website www.PastorBANAFCRASettlement.com dedicated to this matter to provide information to the Class Members and to answer frequently asked questions. The website URL was set forth in the Mail Notice Publication Notice and Long Form Notice. Visitors of the website can download copies of the Long Form Notice, Claim Form and other case-related documents including Class Counsel's Motion for Attorney's Fees and Costs. Visitors can also submit claims online. McComb Decl., ¶ 15.

After the Court's March 13, 2018 Order re Supplemental Preliminary Approval (Dkt. No. 75), KCC updated the website to comply with the court's order.[7] *Id*. KCC also uploaded the relevant court documents to the website. Following the March 13, 2018 order, KCC also reestablished the website to accept claims submitted online for all class members (in both Group 1 and Group 2). *Id.*

E. Interactive Voice Response

15. On August 15, 2017, KCC established an Interactive Voice Response ("IVR") toll-free telephone number dedicated to answering telephone inquiries from Class Members and to file Claims through the IVR. McComb Decl., ¶ 16. Following the Court's March 16, 2018 order granting the Supplemental Preliminary Approval Motion, KCC reestablished the IVR for claims to be filed by all members. *Id*.

F. Claims Procedure, Including Expenses, And Claims Received

Class Members were provided no less than ninety (90) days to make a claim for a Settlement payout. Kazerounian Decl., ¶ 14; *see also* Agr. ¶ 8; Addendum ¶ 14.

The procedure for submitting a claim was made as easy as possible – a claim form could be submitted online via the Settlement Website, through IVR or by U.S. Mail. Kazerounian Decl., ¶ 15. All that was required was the Class Member's full name and address and signature on the provided claim form. Dkt. No. 56-2.

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[7] In particular, KCC changed the website to comply with the following requirements under the Court's order:

a. The site should not use the acronym "BANA."
b. The Frequently Asked Questions page must be updated.
c. The class notice page should be updated once the second notice is finalized; the page should also attach blank claim forms.
d. The personalized claim forms on the website must be modified so they no longer state the outdated November 17, 2017 deadline.

KCC has received 114,512 valid claims from Class Members as of July 19, 2018. McComb Decl., ¶ 19. This equates to claims rate for valid claims of approximately 19.52% from the 586,801 Class Members that were mailed notice.

KCC will issue awards in the form of the settlement checks thirty (30) days of the Effective Date to the Class Members who have submitted valid claim forms. Agr. ¶ 69. The checks will expire 90 days after issuance. Agr. ¶ 73.

1. No Objections and Only 33 Requests For Exclusion

Class Members were permitted to opt-out or to submit an objection. *See* Agr. ¶¶50-52; Addendum ¶¶ 11-13. As of July 6, 2018, KCC has received only 33 requests for exclusion and there are no objections to the Settlement.[8] McComb Decl., ¶ 17. The deadline to submit a request for exclusion or object was June 19, 2018. *Id*.

The fact that there are no objections and only 33 timely exclusion requests out of approximately 586,000 Class Members highly supports the adequacy of the proposed Settlement. *In re Diamond Foods, Inc*., 2014 U.S. Dist. LEXIS 3252, *9 (N.D. Cal. Jan. 10, 2014) ("Also supporting approval is the reaction of class members to the proposed class settlement. After 67,727 notices were sent to potential class members, there have been only 29 requests to opt out of the class and no objection to the settlement or the requested attorney's fees and expenses.").

2. Timothy Thrasher Letter

On November 14, 2017, a letter was received by the Court from a Class Member Timothy L. Thrasher. See Dkt. No. 59. In this mailing, Mr. Thrasher completed the claim form. *Id*. pg 2. In Mr. Thrasher's letter he requested $697,300.00 from Bank of America related to a home foreclosure. *Id*. pg. 1. Mr.

[8] Class Counsel are also unaware of any objection from any of the Attorney Generals. Kazerounian Decl. ¶ 17.

Thrasher's letter did not specify he was objecting to the settlement, nor did he indicate he wanted to opt-out of the settlement. *Id*. Plaintiff's counsel attempted to call Mr. Thrasher at a phone number contained in Mr. Thrasher's filed documents, but was not able to reach Mr. Thrasher for a clarification of his position. McGlothlin Decl. ¶ 20. In light of the fact that Mr. Thrasher completed the claim form, combined with the fact that the issues raised in Mr. Thrasher's letter are unrelated to the claims being released, Class Counsel has no objection to consider Mr. Thrasher's filing a valid claim form.

3. Arthur Hill Letter

On January 8, 2018, a letter was received by the Court from an individual named Arthur Hill. Mr. Hill claimed to be a former auto loan customer of BANA. *See* Dkt. No. 65. Mr. Hill claimed that he "fit squarely within the criteria for class members," but had not received notification of this matter. *Id.* at 1. Mr. Hill stated that if he had received notice, he would have opted out of the class. *Id.* Mr. Hill later sued BANA individually in a separate lawsuit, and the parties reached a settlement and his claims were released therein.

4. Settlement Checks

The net settlement fund available to pay Group 1 Class Members is 419,726.58, which was determined by subtracting the anticipated combined Class Representative service awards totaling $20,000 ($5,000 each), Class Counsels' requested fees of $411,250[9], Class Counsels' actual litigation expenses of $19,023.42, and total settlement administrative costs of $775,000 from the Settlement Fund. McComb Decl., ¶ 20. Based on the net settlement funds and 103,269 valid claims from Group 1, each valid claimant in Group 1 would receive approximately $4.06 from this Settlement. Additionally, as explained in the

[9] $20,000 of Class Counsel's fee request is to be paid by BANA outside the original $1,645,000 settlement fund for a total fee request of $431,250.

Revised Settlement, each member of Group 2, will receive that same amount.

VI. THE PROPOSED SETTLEMENT IS FUNDAMENTALLY FAIR, REASONABLE, AND ADEQUATE, AND SHOULD BE FINALLY APPROVED

As the Court ruled in its Preliminary Approval Order and the Supplemental Preliminary Approval Order the class settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class members. *See* Preliminary Approval Order, Dkt. No. 55, pp. 2-3; Supplemental Preliminary Approval Order, Dkt. No. 79, pp. 3-4. The relevant factors demonstrate that the proposed Settlement should also be finally approved as fair, reasonable and adequate as well.

A. The Settlement Satisfies The Requirements of Fed. R. Civ. P. 23

The Rule 23(a) and (b) factors were previously analyzed and applied by Plaintiffs in the Motion for Preliminary Approval (Dkt. No. 46). However, Class Counsel will briefly discuss each factor here.

i. The members of the Settlement Class are sufficiently numerous.

Generally, the numerosity requirement is satisfied when the class is comprised of 40 or more members. *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). In this case, the class was 526,627 people in Group 1 and 60,174 people in Group 2 for a total of 586,801 people. McComb Decl., ¶ 11. As a result, this putative class action far exceeds the numerosity threshold and meets the first prerequisite of Rule 23 for settlement purposes.

ii. The requirement of commonality is satisfied.

The second prerequisite to class certification is the existence of questions of law or fact that are common to the class. Fed. R. Civ. P. 23(a)(2). The Ninth Circuit has made clear that the commonality requirement is to be "construed

permissively." *Dukes v. Wal-Mart, Inc.*, 774 F.3d 1214, 1225 (9th Cir. 2007). The existence of shared legal issues" will satisfy the commonality requirement even if there are "divergent factual predicates." *Dukes*, 774 F.3d at 1225.

In this case, the significant common issues presented are whether each of the Class Members' credit reports were obtained, and, if so, whether each class member had an existing open account with Bank of America. Based upon this conduct, Class Members all seek the same remedy as permitted by the FCRA. Under these circumstances, the commonality requirement is satisfied for purposes of certifying a settlement class.

iii. The requirement of typicality is satisfied.

The third prerequisite to class certification is that Plaintiffs' claims are typical of the class. Fed. R. Civ. P. 23(a)(3). A plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.3d 225, 232 (7th Cir. 1983).

Here, Plaintiffs' claims are based on BANA's systematic, automated account review inquiries. Because Plaintiffs' claims arise from the same course of conduct by BANA, typicality under Rule 23(a)(3) is satisfied. Since each Class Member also had their credit reports reviewed by BANA, there is a unity of interest between Plaintiffs and the Class Members that Plaintiffs seek to represent. Stated differently, the violation of the FCRA alleged by Plaintiffs is the same violations alleged by the Class Members. Therefore, Plaintiffs' claims are typical of the claims of the class.

iv. The requirement of adequate representation is satisfied.

The final requirement of Rule 23(a) is that the representative plaintiffs will

fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). "This factor requires: (1) that the proposed representative plaintiffs do not have conflicts of interest with the proposed class, and that plaintiffs are represented by qualified and competent counsel." *Dukes*, 509 F.3d at 1185.

There is no intra-class conflict between the class representatives and the other class members. Each class representative understands the case and why it was brought on each of their behalf. Further, Plaintiffs' attorneys are knowledgeable and experienced in class action litigation and in litigation of FCRA claims and are free from conflicts with the class. See Decl. of Swigart, ¶ 9; Kazerounian ¶ 9.

Since preliminary approval, Plaintiffs have continued to serve as adequate Class Representatives by reviewing documents and submitting declarations in support of the Fee Brief; and Plaintiffs support final approval of the proposed settlement. *See* Kazerounian Decl., ¶ 10. Class Counsel have continued to adequately represent the interests of the Class Members and the named Plaintiffs, having, among other things, timely filed the Fee Brief on October 12, 2017 (Dkt. No. 58) and assisted with settlement administration and responded to Class Members' inquiries (Kazerounian Decl., ¶ 11; Declaration of Joshua B. Swgart ("Swigart Decl."), ¶ 11; and Declaration of David J. McGlothlin ("McGlothlin Decl."), ¶ 11).

v. The Action meets the requirements of Rule 23(b)(3).

Once the four requirements of Rule 23(a) are met, "the potential class must also satisfy at least one provision of Rule 23(b)." *Rosario*, 963 F.3d at 1017; see also *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Rule 23(b)(3) states that a class may be certified when "questions of law or fact common to class members predominate over any questions affecting only individual members, and [...] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Common issues predominate here because the central question concerning BANA's conduct in this case—whether BANA conducted systematic account reviews on class members' credit files—can be established through generalized evidence. *See, e.g., In re Heartland*, 851 F. Supp. 2d at 1059 ("[T]his case presents several common questions of law and fact arising from a central issue: Heartland's conduct … the resulting injury to each class member from that conduct. Given the settlement posture of this case and the Fair Credit Reporting Act claim, the common questions predominate over individual issues.")

B. The Settlement Should Be Finally Approved By The Court.

"Unlike the settlement of most private civil actions, class actions may be settled only with the approval of the district court." *Officers for Justice v. Civil Service Com'n of City and County of San Francisco,* 688 F.2d 615, 623 (9th Cir. 1982). "The court may approve a settlement . . . that would bind class members only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The Court has broad discretion to grant such approval and should do so where the proposed settlement is "fair, adequate, reasonable, and not a product of collusion." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998).

"To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: 'the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.'" *Staton v. Boeing Co*., 327 F.3d 938, 959 (9th Cir. 2003). "The relative degree of

importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. The Court must balance against the continuing risks of litigation and the immediacy and certainty of a substantial recovery. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *In re Warner Communications Sec. Litig.,* 618 F. Supp. 735, 741 (S.D. N.Y. 1985).

The Ninth Circuit has long supported settlements reached by capable opponents in arms' length negotiations. In *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), the Ninth Circuit expressed the opinion that courts should defer to the "private consensual decision of the [settling] parties." *Id.* at 965, citing *Hanlon*, 150 F.3d at 1027 (9th Cir. 1998). The district court must exercise "sound discretion" in approving a settlement. *See Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir. 1993); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd* 661 F.2d 939 (9th Cir. 1981). However, "where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation conducted by capable counsel, it is presumptively fair." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987); *In re Ferrero Litig.*, 2012 U.S. Dist. LEXIS 15174, *6 (S.D. Cal. Jan. 23, 2012) ("Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair.") (citing *Nat'l Rural Telcoms. Coop. v. Directv, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)).

Application of the relevant factors here confirms that the proposed settlement should be finally approved. This Settlement was reached with the assistance of experienced mediator, Hon. Judge Edward Infante (Ret.), which demonstrates a lack of collusion between the parties. *See Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 948 (9th Cir. Cal. 2011). Based on the

facts of this case, Class Counsel and the named Plaintiffs agree that this Settlement is fair and reasonable; among other things, the Settlement will avoid costly and time-consuming additional litigation and the need for trial. Kazerounian Decl., ¶¶ 8 and 13; Swigart Decl., ¶ 8 and 13; McGlothlin Decl., ¶ 10 and 15.

1. The Strength of The Lawsuit And The Risk, Expense, Complexity, And Likely Duration of Further Litigation

Defendant has raised numerous defenses to the Plaintiff's claims and putative class claims. *See* Recitals to Agr. Many of these defenses are set forth at length in the Joint Motion to Certify Class and Approve Class Action Settlement (Dkt. No. 46). Defendant contends that its defenses have merit and would defeat the claims of the putative class. *See* Recitals to Agr. However, settlement eliminates any further risk and expense for the parties.

Considering the potential risks and expenses associated with continued prosecution of the lawsuit, the probability of appeals by both sides, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation, the proposed settlement is fair, reasonable, and adequate. As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise, "a yielding of absolutes and an abandoning of highest hopes." *Officers for Justice*, 688 F.2d at 624. "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation . . ." *Id.*

While Class Counsel believe strongly in the merits of the claims brought on behalf of the proposed Class (*see* Joint Motion to Certify Class and Approve Class Action Settlement, Dkt. No. 46, pg 5, 19-20.), they also recognize that any case encompasses risks and that settlements of contested cases are preferred in this circuit.

Even if Plaintiffs were to prevail at trial, risks to the class remain. *See West*

Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced"), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial). "Indeed, courts have previously granted approval to class action settlements precisely because certification of such actions is a risky endeavor." *Bayat v. Bank of the West*, 2015 U.S. Dist. LEXIS 50416, *12 (N.D. Cal. Apr. 15, 2015) (citing *In re Capital One*, 80 F. Supp. 3d 781, 2015 U.S. Dist LEXIS 17120 at *22-23 (approving class settlement in light of "serious obstacles to class certification")).

The risks in this action were explained in detail in the Joint Motion to Certify Class and Approve Class Action Settlement, Dkt. No. 46. Briefly, however, Plaintiffs face several risks due to: 1) Whether BANA had a permissible purpose to access consumer's credit reports, 2) difficulties in determining whether BANA's actions in obtaining the credit report were negligent and/or willful and what actual damages, if any, were sustained by class members; and 3) a potential motion by Defendant challenging Plaintiffs' Article III standing, as many FCRA defendants have done following the Supreme Court's decision in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Courts have determined that the FCRA is ambiguous and does not distinguish between open and closed accounts, leaving open the question of whether it is permissible to conduct Account Review Inquiries on closed accounts. *See Levine v. World Fin. Network Nat'l Bank*, 554 F.3d 1314, 1318-1319 (11th Cir. 2009) ("[W]e cannot say that the term 'account' necessarily means 'an open account[]'"; affirming summary judgment dismissal of plaintiff's claim that it was impermissible to conduct account reviews on closed accounts); *Wilting v Progressive County Mutual Insurance Co.*, 227 F.3d 474, 476 (5th Cir. 2000)

(rejecting plaintiff's claim that only "existing" accounts could be reviewed and noting that "neither the [FCRA] nor the FTC's commentary on the Act suggests that a report may only be permissibly obtained during particular points in the parties' relationship[]"); *see also Banga v. Experian Info. Solutions, Inc.*, 473 F. App'x 699 (9th Cir. 2012) (affirming district court's holding that it is not objectively unreasonable to read the FCRA as permitting inquiries on closed accounts).

Additionally, some courts have found that a consumer's discharge of personal liability in bankruptcy does not necessarily eliminate the creditor's permissible purpose for conducting Account Review Inquiries, even though the consumer's liability to pay the account is discharged in bankruptcy. *See, e.g.*, *Germain v. Bank of Am., N.A.*, No. 13-cv-676, 2014 U.S. Dist. LEXIS 158874, at *13-15 (W.D. Wis. Nov. 7, 2014), *reconsideration denied*, 2015 U.S. Dist. LEXIS 14009 (W.D. Wis. Feb. 5, 2015).

Finally, there is a real possibility that Defendant's actions could be determined to be merely negligent and that no actual damages were suffered by the Class. If that were to occur, the class would not be entitled to any statutory damages, as statutory damages are only available for willful violations of the act. *See* 15 U.S.C. § 1681n(a)(1)(A). The only court of appeals to confront the issue of Account Review Inquiries on closed accounts is the Eleventh Circuit in *Levine*. The court of appeals held in *Levine* that there could be no willful violation of the permissible purpose provisions of the FCRA because the statute did not distinguish between open and closed accounts. Therefore, interpreting the FCRA to permit Account Review Inquiries on closed accounts was not "objectively unreasonable." 554 F.3d at 1318-19. The *Levine* court also held that "*Safeco* makes clear that evidence of subjective bad faith cannot support 'a willfulness finding . . . when the company's reading of the statute is objectively reasonable.'" *Id.* at 1319 (citations

omitted). These cases demonstrate that the probability of success in this case could be considered low due to the many legal obstacles to overcome on the merits.

2. The Amount Offered In Settlement

As mentioned above, the Revised Settlement Agreement required Defendant to provide a Settlement Fund of $1,645,000. Agr. ¶ 37. Under the Addendum, BANA agreed to pay each of the Affected Settlement Class Members who makes a valid claim the amount that each of the Original Settlement Class Members would have received under the original settlement. *See* Addendum ¶ 9. Each valid and approved claim is entitled to a *pro rata* share of the Settlement Fund, after administrative costs, a service award to the Class Representative, and attorneys' fees and costs are deducted. Agr ¶ 69. This is an all-in, non-reversionary settlement and all uncashed checks will be distributed to a *cy pres* recipient to be approved by the Court. Agr ¶ 75. As there are 114,512 valid claims thus far (McComb Decl., ¶ 19), the individual recovery to the Class Members is approximately $4.06.

The range of recovery upon proof of a willful violation of the FCRA is $100 to $1,000. The range of possible recovery must take into account the likelihood of success on the merits. The Court should not evaluate the adequacy of this Settlement against some theoretically available judgment, but against what Plaintiff could reasonably expect to recover. As previously discussed, there is a significant chance that Plaintiffs could not establish that Defendant's actions were willful and not merely negligent.

It is well-settled that a proposed settlement may be accepted where the recovery represents a fraction of the maximum potential recovery. *See e.g.*, *Nat'l Rural Tele. Coop v. DIRECTV, Inc.*, 221 F.R.D 523, 527 (C.D. Cal. 2004) ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000) ("the fact that a proposed settlement

constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather, the percentage should be considered in light of strength of the claims"); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459 (approving a settlement that comprised one-sixth of plaintiffs' potential recovery).

As the *Linder* Court explained, "…it is firmly established that the benefits of certification are not measured by reference to individual recoveries alone. Not only do class actions offer consumers a means of recovery for modest individual damages, but such actions often produce several salutary by-products, including a therapeutic effect upon those [entities] who indulge in [illegal] practices, aid to legitimate business enterprises by curtailing illegitimate [conduct], and avoidance to the judicial process of the burden of multiple litigation involving identical claims." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 445 (Cal. 2000) (internal quotations omitted).

The Ninth Circuit found that the district court did not abuse its discretion in approving payment of $15 per claiming class member (.02% of $750) where there were long odds of winning the case. *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 943-44 (N.D. Cal. 2013), *aff'd sub nom. Fraley v. Batman*, No. 13-16819, 2016 U.S. App. LEXIS 518 (9th Cir. Jan. 6, 2016). Moreover, the Ninth Circuit specifically noted that $15 received by class members who filed claims was reasonable given the "minimal (if any) harm" suffered by the plaintiffs. 2016 U.S. App. LEXIS 518, at *1. The Ninth Circuit also noted that awarding $750 in available statutory damages per claimant would implicate due process concerns. *Id.*

A similar situation exists here. Plaintiff faced significant litigation risks, and Plaintiff and the Settlement Class Members suffered no legally cognizable actual harm. Thus, the $1,802,998.58 represents true value to the class.

The relief afforded to the Class Members here is in line with an almost identical action involving Chase Bank. *Duncan v. JPMorgan Chase Bank, N.A.*,

W.D. Tex Case No. 5:14-cv-00912-FB. That case also had an unusually high claims rate, specifically 22.28%. *Duncan v. JPMorgan Chase Bank, N.A.*, 2016 WL 4419472, *6. The unexpectedly high claims rate let to a smaller payment than anticipated. Class Members in Chase received less than $9 a person. *Id.* at *16, See also, *Chase v. JPMorgan Chase Bank, N.A.*, W.D. Tex Case No. 5:14-cv-00912-FB, Dkt. No. 93 (June 20, 2016) (Judge Biery's Amended Order Accepting In Part memorandum and Recommendation of the United States Magistrate Judge).

The only other common fund FCRA impermissible pull settlement counsel is aware of was for a much smaller class size. *See King v. United SA Fed. Credit Union*, 744 F.Supp.2d 607 (W.D. Tex. 2010) (establishing a common fund of $500,000 for a class of 7,000 in a similar case involving a FCRA account review class action). All other known class action account review cases that have settled have provided non-cash relief, including short term credit monitoring, credit scores, or other "coupon-type" relief. *See, e.g.*, *Barel v. Bank of America*, 255 F.R.D. 393, 402 (E.D. Pa. 2009) (credit report monitoring); *Nienaber v. Citibank*, No. Civ. 04-4054 (S.D.) (credit report monitoring); *Perry v. FleetBoston Corp*., 229 F.R.D. 105, 110 (E.D. Pa. 2005) (two credit reports and scores); *Keener v Sears,* 03-cv-1265 (C.D. Cal) (Coupon for Sears store products).

Additionally, this dollar amount is comparable to amounts that have been approved in Telephone Consumer Protection Act cases, where the strict liability statute allows $500-$1,500 in statutory damages per TCPA violation. *See Rose v. Bank of Am. Corp.*, 2014 U.S. ($20.00); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 11-md-2261 (S.D. Cal.) Dist. LEXIS 121641 (N.D. Ill. 2014) ($15.00; or, $20.00 voucher); *Kazemi v. Payless Shoesource, Inc.*, 09-cv-5142 (N.D. Cal.) ($25.00 voucher); *In re Capital One Telephone Consumer Protection Act Litigation*, 12 C 10064 MDL No. 2416 (N.D. Ill. 2015) ($34.60). Therefore, the estimated recovery provided by this settlement is in line with similar consumer class action settlements.

3. Class Members were provided with the best notice possible, which afforded them an opportunity to choose whether to participate in the Settlement.

Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the court must direct to class members the "best notice practicable" under the circumstances. Rule 23(c)(2)(B) does not require "actual notice" or that a notice be "actually received." *Silber v. Mabon*, 18 F. 3d 1449, 1454 (9th Cir. 1994).

According to the Claims Administrator, direct mail notice was provided to 586,801 Class Members (526,627 Group 1 Class Members and 60,174 Group 2 Class Members). 63,717 of the notices were returned as undeliverable, and the Claims Administrator was able to locate a new address for 45,447 of the class members. (McComb Decl., ¶ 12). Therefore, approximately 96.9% of the total class received notice of the settlement via direct mail, which satisfies due process. *See* Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, at p. 3 (2010) (recognizing that a reach of between 70-95% is reasonable); *see also Wilson v. Airborne, Inc.*, 2008 U.S. Dist. LEXIS 110411, *13-14 (C.D. Cal. Aug. 13, 2008) (court granted final approval of settlement where measurements used to estimate notice reach suggested that 80% of adults learned of the settlement).

This is a consumer case and consequently subject to lower claims rates than other types of cases. *See e.g.*, *In re Mego Fin'l Corp. Sec. Litig.*, 213 F. 3d 454, 459 (9th Cir. 2000); *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d. 34, 44 (D. Me. 2005) (Signal, C.J.) ("'Claims made' settlements regularly yield response rates of 10 percent or less."). Usually, 3-5% of the eligible class members will submit valid claims during the settlement process. *See Forcellati v. Hyland's Inc.*, 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014) ("[T]he prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3-5 percent."); and, *Ferrington v. McAfee, Inc.*, 2012 WL 1156399, at *4 (N.D. Cal. Apr. 6, 2012)

(same). However, this case, with a valid claims rate of approximately 19.52%, is significantly higher than average. The high claims rate indicates the Class was given sufficient notice, understood the settlement, and approved the settlement.

4. The Extent of Discovery Completed

Although many of the facts alleged in the complaint were not in dispute, a significant amount of discovery still took place. Class Counsel performed significant factual investigation prior to bringing the action, and, Class Counsel conducted extensive written discovery. Specifically, Plaintiff Pastor served on Defendant written discovery consisting of 18 requests for admission, 14 interrogatories, and 27 document requests. McGlothlin Decl., ¶ 6. Furthermore, Class Counsel met and conferred with Defendant on several discovery disputes. McGlothlin Decl., ¶ 7. Thus, the litigation here had reached the stage where "the parties certainly have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications*, 618 F. Supp. at 745.

Once the parties agreed to a framework of a settlement, Class Counsel then took a Fed. R. Civ. P. 30(b)(6) confirmatory deposition as well as sent a second set of written discovery. McGlothlin Decl., ¶ 8. Class Counsel participated in protracted negotiations including a mediation before Judge Edward A. Infante (Ret.), which ultimately secured a nationwide settlement for the benefit of the Class. Kazerounian Decl., ¶ 5.

Considering that two of the main disputed issues between the parties are legal (*i.e.,* were Defendant's actions willful or merely negligent; and is a class action maintainable under Fed. R. Civ. P. 23?), and not factual in nature, the parties have exchanged sufficient information to make an informed decision about settlement. *See Linney v. Cellular Alaska Partnership,* 151 F.3d 1234, 1239 (9th Cir. 1998).

5. The Experience And Views of Class Counsel

"The recommendations of plaintiff's counsel should be given a presumption

of reasonableness." *Boyd v. Bechtel Corp.,* 485 F. Supp. 610, 622 (N.D. Cal. 1979). The presumption of reasonableness in this action is fully warranted because the settlement is the product of arm's length negotiations conducted by capable, experienced counsel. *See M. Berenson Co*., 671 F. Supp. at 822; *Ellis*, 87 F.R.D. at 18 ("that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"); 2 *Newberg on Class Actions* § 11.24 (4th Ed. & Supp. 2002); *Manual for Complex Lit.,* Fourth § 30.42.

It is the considered judgment of Class Counsel experienced in consumer class action litigation that this settlement is a fair, reasonable and an adequate settlement benefiting the Class. Kazerounian Decl., ¶¶ 8 and 13; Swigart Decl., ¶¶ 8 and 13; McGlothlin Decl., ¶¶ 10 and 15.

This Settlement was negotiated without collusion by experienced and capable Class Counsel who now recommend its approval. *See* Recitals to Agr.; Kazerounian Decl., ¶ 8. Significantly, the Settlement was reached with the assistance of Judge Edward A. Infante (Ret.). Given their experience and expertise, Class Counsel are well-qualified to not only assess the prospects of a case, but also to negotiate a favorable resolution for the class. Class Counsel have achieved such a result here in this FCRA class action, and unequivocally assert that the proposed Settlement should receive final approval. Kazerounian Decl., ¶ 8; Swigart Decl., ¶ 8; McGlothlin Decl., ¶ 10.

6. The Reaction of Class Members To The Settlement

The fact that there are no objections and only 33 timely requests for exclusion (McComb Decl., ¶ 17) is important in evaluating the fairness, reasonableness and adequacy of the settlement – which supports approval of the settlement here. *See Steinfeld v. Discover Fin. Servs*., 2014 U.S. Dist. LEXIS 44855, *21 (N.D. Cal. Mar. 31, 2014) (only specific objections or comments from 9 class members, and 239 out of the approximately 8 million class members chose to

opt out); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) ("Upon considering the high rate of Class Member claims and the relatively low number of requests for exclusion, the Court finds the reaction of the Class to the Settlement favors approval of the Settlement."); *Stemple*, 2016 U.S. Dist. LEXIS 157207 at *7-8 (finding the lack of objections supported approval of the TCPA settlement). Thus, there has been no resistance to the Settlement.

VII. CONCLUSION

In sum, the parties have reached this Settlement following extensive arms' length negotiations before Hon. Edward A. Infante (Ret.). The Settlement is fair and reasonable to the Class Members who were afforded notice that complies with due process. For the foregoing reasons, Plaintiffs respectfully request the Court:

- Grant final approval of the proposed settlement;
- Order payment from the settlement proceeds in compliance with the Court's Preliminary Approval Order and the Agreement;
- Grant the Motion For Attorney's Fees, Costs and Incentive Payments;
- Enter the proposed Final Judgment and Order of Dismissal with Prejudice submitted herewith; and,
- Retain continuing jurisdiction over the implementation, interpretation, administration and consummation of the Settlement.

Dated: July 20, 2018

HYDE & SWIGART

By: /s/ David McGlothlin
David McGlothlin, ESQ.
Class Counsel